UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, NASHVILLE RESIDENT OFFICE

JOHNSTON FIRE SERVICES, LLC	:	
and	:	10-CA-175681 10-CA-177542
ROAD SPRINKLER FITTERS LOCAL UNION 669	:	10-RC-177308
	:	

CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE KELTNER W. LOCKE

Respectfully submitted,

/s/ David O'Brien Suetholz
David O'Brien Suetholz
Pamela M. Newport
Kircher, Suetholz & Associates, PSC
515 Park Avenue
Louisville, KY 40208
Tel: (502) 636-4333
Fax: (502) 636-4342
dave@unionsidelawyers.com
pamela@unionsidelawyers.com

Attorneys for Charging Party
Road Sprinkler Fitters, Local Union 669

I. INTRODUCTION

Charging Party Road Sprinkler Fitters, Local Union 669 ("Union" or "Charging Party"), pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, has filed Exceptions to the Decision and Order of the Administrative Law Judge Keltner W. Locke, which issued in the above-captioned case on March 3, 2017. Charging Party excepts to certain factual findings and legal conclusions of the ALJ, as well as his ultimate ruling that the Respondent, Johnston Fire Services, LLC ("Company" or "Respondent") "did not violate the Act in any manner alleged in the Complaint."[1] The Union also excepts to Judge Locke's Recommended Order to dismiss the Complaint, to sever Case 10-RC-177308 from the proceedings and remand back to the Regional Director to issue certification of the results of the election.[2] Respondent further excepts to certain findings of fact and legal conclusions as set forth more fully in the Exceptions to the Decision and Order of the ALJ, which this Brief supports.

II. STATEMENT OF THE CASE

This matter arises from a Consolidated Complaint against the Company based on unfair labor practice charges filed by the Union.[3] During the same timeframe, the Union also filed a petition in Case 10-RC-177308, and an election was held on June 16, 2016.[4] The Board agent counted the ballots on July 1, 2016.[5] The vote count was 2 votes for the Union, 2 votes against, and 2 challenged ballots.[6]

---

[1] ALJD 26:27. Citations to the ALJ's Decision will be cited as "ALJD" and followed by the page and/or line numbers. Citations to General Counsel Exhibits will be cited as GCX ___. Citations to Respondent's Exhibits will be cited as RX __. Citations to the Transcript will be cited as Tr. __.
[2] ALJD 26:34-40.
[3] Case Nos. 10-CA-175681 and 10-CA-177542.
[4] ALJD 2:1-8.
[5] ALJD 2:10.
[6] ALJD 2:10-14.

Region 10, acting on behalf of the Board's General Counsel ("General Counsel") issued Complaint in Case 10-CA-175681 on July 21, 2016.[7] The General Counsel then later issued a Consolidated Complaint on August 8, 2016 to include Case 10-CA-177542.[8] On that same day, the Regional Director issued a Report on Challenges, Order Consolidating Cases, and Notice of Hearing to consolidate the ULP cases with the representation case.[9] A hearing on this matter was opened on October 17, 2016 in Paducah, Kentucky before ALJ Keltner W. Locke.[10] Judge Locke adjourned the hearing until November 29, 2016, when the parties gave oral closing arguments via conference call.[11] ALJ Locke then issued his decision in this matter on March 3, 2017.

III. ISSUES PRESENTED

A. Whether the ALJ improperly determined that the Company did not unlawfully create an impression of surveillance among its employees;[12]

B. Whether the ALJ improperly determined that the Company did not unlawfully interrogate an employee about his union sympathies;[13]

C. Whether the ALJ improperly determined that the Company did not unlawfully tell an employee he was untrustworthy because of his union activities;[14]

D. Whether the ALJ improperly determined that the Company did not unlawfully discharge employee Michael Pirtle;[15]

[7] ALJD 2:19-22.
[8] ALJD 2:24-27.
[9] ALJD 2:29-31.
[10] ALJD 2:33.
[11] ALJD 2:33-35.
[12] Exceptions 2, 5-7, 9, 15, 28.
[13] Exceptions 2, 5-6, 9-15, 28.
[14] Exceptions 2, 5-6, 8, 15, 28.
[15] Exceptions 1-6, 9, 16-21, 28.

E. Whether the ALJ improperly determined that the Company did not unlawfully discharge employee Robert Rhodes;[16] and

F. Whether the ALJ improperly concluded that the Region should certify the results of the election and not count the challenged ballots.[17]

IV. STATEMENT OF FACTS IN SUPPORT OF EXCEPTIONS

Johnston Fire Services, LLC installs sprinkler systems.[18] Sometime in 2015, the Company began work at South Marshall Middle School in Paducah, KY.[19] This project was governed by Kentucky's prevailing wage ("PW") laws at that time.[20]

Charging Party in this case, Road Sprinkler Fitters, Local Union 669, represents employees in the sprinkler fitter industry.[21] One of the Union's organizers, Todd Johnson, has known the Company's owner, David Johnston ("DJ")[22] for many years.[23] At some point, Johnson called DJ and told him he had heard that the Company had been awarded the project at the middle school.[24] DJ denied this.[25] Johnson told DJ if he did get the contract to let him know and he could assist with the workforce.[26] Johnson also told DJ he would be monitoring the job site to ensure everything was running smoothly for the workers.[27]

[16] Exceptions 1, 22-28.
[17] Exceptions 1-6, 9, 16-29.
[18] ALJD 5:33.
[19] ALJD 6:3-6.
[20] *Id.*
[21] Tr. 53.
[22] "DJ" is being used because of the similarities between Mr. Johnston's last name and the name of Union organizer Todd Johnson.
[23] Tr. 54.
[24] Tr. 62.
[25] *Id*.
[26] *Id*.
[27] *Id.*

True to his word, Johnson visited the jobsite in the fall of 2015.[28] Johnson spoke with employee Zebulon Gordon and they discussed wages.[29] Johnson also learned that the Company was not paying the workers the correct PW rates.[30]

Michael Pirtle began working for Respondent in about December 2015.[31] Pirtle had worked for Respondent a few times in the past, generally quitting after a few months.[32] Johnson also spoke with Pirtle at the jobsite. On about January 5, 2016, they spoke about wage rates.[33] Later that evening, Johnson and Pirtle met off-duty to continue their discussion.[34] Johnson had more conversations with Pirtle and Gordon about their working conditions in the subsequent months.[35] Sometime in late March, Johnson, Pirtle, Gordon, and Union counsel had dinner to discuss a prevailing wage lawsuit.[36] They also discussed the NLRB process for filing for an election and signing authorization cards.[37] Pirtle signed an authorization card that evening; Gordon signed at a later time.[38]

A couple of days after this dinner meeting, on about March 30, 2016, Gordon told DJ about the meeting he had with Johnson and the attorneys.[39] Gordon also told DJ that Pirtle had attended this meeting.[40] DJ seemed appreciative that Gordon brought these matters to his attention.[41]

---

[28] Tr. 55.
[29] Tr. 56, 132.
[30] Tr. 58.
[31] Tr. 21.
[32] *See e.g.* GCX 6 (payroll reports) and Tr. 218.
[33] Tr. 56.
[34] *Id.*
[35] Tr. 58.
[36] Tr. 58-59. A prevailing wage lawsuit was filed on behalf of Gordon and Pirtle on about May 5, 2016.
[37] *Id*.
[38] *Id*.
[39] Tr. 31, 134-35.
[40] Tr. 135.
[41] Tr. 136.

On March 31, 2016 – only a day or so after Gordon confessed to DJ – Pirtle came to work around 7:30 a.m.[42] DJ asked to speak to Pirtle and said something to him about being "audited" and about the union.[43] DJ told Pirtle he was being fired because he could not trust him anymore.[44] DJ also asked Pirtle if he had been talking with Johnson – even though he knew that he had – to see if Pirtle would "admit it."[45] DJ never mentioned anything about Pirtle's attendance or work performance being a problem.[46]

According to DJ, he had planned on firing Pirtle since about March 28, but just needed a replacement first.[47] Office Manager Tracy Oliver testified that DJ's wife had even called to let her know she was concerned about how many hours DJ had been working.[48] In addition, Robert Rhodes had been calling for at least a month before DJ fired Pirtle, looking for work.[49]

On about April 6, 2016, about a week after Pirtle was discharged, Respondent hired Robert Rhodes.[50] While employed, Rhodes spoke with Gordon about the prevailing wage issue, as well as with Todd Johnson.[51] During this timeframe, the Union filed an RC petition on May 31.[52] Rhodes was concerned about the PW issue and, knowing Pirtle had been fired, he also was concerned if he spoke up he would lose his job.[53] To protect

---

[42] Tr. 88.
[43] *Id*.
[44] *Id.*
[45] Tr. 28, 43-44.
[46] Tr. 88.
[47] Tr. 33, 43, 175.
[48] Tr. 168, 173, 192-93.
[49] Tr. 175.
[50] There is some dispute about when Rhodes began work. Respondent asserts Rhodes began working on April 1, but the Company's documents do not indicate that Rhodes worked at all week ending April 2. Payroll records submitted by the Company indicate Rhodes began working April 4. Rhodes filled out his W-4, however, on April 6. *See* GCX 4 and 6.
[51] Tr. 107-108.
[52] GCX 1(e).
[53] Tr. 109, 115.

himself, Rhodes reviewed and signed an intent to strike letter that Johnson gave him.[54] Rhodes signed the letter on May 31st, and the strike date was set as June 3rd.[55]

Rhodes had a terrible stomach virus and did not go to work on May 31 or June 1.[56] On June 2, however, Rhodes arrived at the jobsite, intending to work that day.[57] Rhodes found DJ and gave him the strike letter.[58] DJ looked at it and said "ok." As Rhodes began walking towards the school to start his work, DJ asked if he had the key to the "gang box," or tool box.[59] Knowing that giving up this key meant he would no longer have access to his work tools, Rhodes asked if he was being fired.[60] DJ responded, "no, you just won't be needed anymore."[61] Rhodes then gave DJ the key, got his tools, and left the jobsite.[62] On June 3, Rhodes returned to the jobsite to get his last paycheck.[63] When he got there, Oliver gave him a letter to sign.[64] The letter stated that Rhodes had voluntarily quit and had been properly paid.[65] Rhodes refused to sign because he did not agree with the letter's terms.[66]

V. ARGUMENT AND LEGAL ANALYSIS

A. Standard of Review

In reviewing Exceptions to an ALJ's decision, the Board should evaluate whether findings of fact are contrary to the preponderance of the evidence.[67] The Act "commits

[54] Tr. 109.
[55] GCX 2; Tr. 109.
[56] Tr. 128.
[57] Tr. 110.
[58] *Id*.
[59] *Id.*
[60] Tr. 111.
[61] *Id*.
[62] *Id*.
[63] Tr. 113.
[64] Tr. 114-15.
[65] Tr. 115.
[66] Tr. 115, 123.
[67] 29 C.F.R. §102.48(c).

to the Board itself, not to the Board's ALJs, the power and responsibility of determining the facts as revealed by the preponderance of the evidence."[68] Accordingly, the Board conducts a *de novo* review of the entire record and is not bound by the ALJ's findings and determinations.

The Board should review this matter and arguments made in this case to determine that the ALJ's decision is not supported by the record evidence or controlling law. The Union's Exceptions should be granted and the Board should find that Respondent did violate sections 8(a)(1) and (3) of the Act. Accordingly, the Board should also order that Pirtle's and Rhodes' challenged ballots be opened and counted.

B. The ALJ's Credibility Determinations are not Supported by the Evidence.

The Board has held that "where credibility determinations are not based primarily upon demeanor, the Board itself may proceed to an independent evaluation of credibility."[69] And even credibility findings that are based on demeanor "are not dispositive when the testimony is inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole."[70] In this case, the Board should make independent credibility determinations with respect to each witness. More specifically, the Board should find that the ALJ's credibility resolutions, discrediting much of the testimony of Pirtle, Rhodes, and Johnson, are not based upon either demeanor or the weight of the evidence, and were made in direct contradiction to reasonable inferences. The Board

[68] *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 544-45 (1950).
[69] *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57, 191 LRRM 1328, 1331-32 (2011) (internal quotations omitted).
[70] *Id.* at 1332.

should credit Pirtle's, Rhode's, and Johnson's accounts to aid in finding that Respondent violated the Act.

C. The ALJ erred in finding that Respondent did not violate Section 8(a)(1) of the Act.

1. Respondent engaged in unlawful interrogation on March 31, 2016.

To determine whether an employer's questioning of employee is unlawful interrogation, the Board looks at whether, under all the circumstances, that interrogation "reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights."[71] Factors to examine include whether there is a history of employer hostility, the nature of the information sought, the identity of the questioner, the place and method of questioning, and the truthfulness of the reply.[72] In *Rossmore House*, the Board referenced these factors as a means to analyze interrogation.[73] And in cases where the Employer's interrogation is accompanied by threats or firing, the interrogation will violate Section 8(a)(1).[74]

In the instant case, and applying the *Bourne/Rossmore* factors, the Board should find that DJ's questioning of Michael Pirtle was unlawful interrogation. Pirtle was questioned by the President of the Company in the office, and asked whether he had been talking to Union organizer Todd Johnson.[75] At trial, DJ attempted to paint himself as someone who bore no hostility towards unions – he had been in the union at one

[71] Tr. 244; *Emery Worldwide*, 309 NLRB 185, 186 (1992).
[72] *Bourne v. NLRB*, 332 F. 2d. 47 (2nd Cir. 1964).
[73] *Rossmore House,* 269 NLRB 1176 (1984).
[74] Tr. 245.
[75] The ALJ found the conversation happened in the parking lot, which the Union excepts to. Even

time, he and Johnson knew each other, and DJ knew Johnson was on his jobsite.[76] But, by digging a bit deeper, the underlying hostility rises to the surface. When Johnson told DJ that he had heard Respondent was awarded the middle school project, DJ denied it.[77] Johnson followed up that he would be "monitoring the job to make sure the workers were paid the correct wages."[78] A prior company of DJ's had been audited by the Kentucky Labor Cabinet before.[79] It is a reasonable inference that DJ did not want Johnson hanging around his jobsite and talking to workers – hence, the need to lie about being awarded the project. It's also reasonable to infer that DJ was aggravated by Johnson acting as watch dog. Pair this history with DJ's testimony, and the hostility is clear:

> Q (by Miller for GC): Could you [look at your affidavit and] read the sentence that starts at the end of line 12 and ends in the middle of line 14?
> A: "I asked Pirtle if he had spoken to Todd Johnson because *I already knew he had been* and wanted to know if he would *admit* he had been talking to him."[80]

It does not matter whether or not DJ asked this question to decide whether to take disciplinary action against Pirtle; the question itself along with DJ's knowledge gave the question an added element of an implied threat. And while Pirtle was truthful in his reply, DJ immediately terminated Pirtle, thereby following through with that threat.[81] The totality of circumstances in this case require a finding that Respondent engaged in unlawful interrogation in violation of Section 8(a)(1) of the Act.

---

[76] Tr. 30.
[77] Tr. 62.
[78] *Id*.
[79] Tr. 61.
[80] Tr. 45 (emphasis added); *see also* Tr. 41.
[81] Tr. 88.

2. Respondent's actions created an unlawful impression of surveillance.

In addition, Respondent created an unlawful impression of surveillance. Pirtle testified that during his conversation with DJ on March 31, DJ asked him about an "audit."[82] Johnson testified the term "audit" in this context is very industry-specific, and used to refer to a situation where an employer is under investigation or "audit" by the Kentucky Labor Cabinet for prevailing wage violations.[83] Given that Johnson spoke with Pirtle very shortly after his discharge, and Johnson recalled Pirtle telling him that DJ had brought up an audit, Johnson's and Pirtle's testimony should be credited over DJ's.[84]

The test for determining whether an employer has created an unlawful impression of surveillance is whether employees would reasonably assume from the employer's conduct that their union activities were under surveillance.[85] DJ's conversation with Pirtle happened very shortly after Pirtle met off-duty with Gordon and the attorneys.[86] When DJ asked Pirtle about an "audit," he gave the impression that he knew about a potential PW lawsuit, or at the least, that the employees had been talking about PW issues. In addition, DJ made this statement when asking about Pirtle's union activity, which would reasonably lead Pirtle, or any employee, to believe that the two were linked and that his union activities were being monitored.[87]

---

[82] Tr. 61, 88.
[83] Tr. 61.
[84] *Id*.
[85] *See Register Guard*, 344 NLRB 1142, 1144 (2005).
[86] Tr. 58-59.
[87] Tr. 88.

3. Respondent violated the Act by telling Pirtle he was "untrustworthy."

Regarding the allegation that Respondent violated Section 8(a)(1) when it told Pirtle he was "untrustworthy," the ALJ credited DJ's version of events and essentially, though not expressly, found that DJ never made this statement.[88] Johnson, however, credibly testified that Pirtle relayed the same story to him when he called him after he had been fired.[89] Given that this conversation was closer in time to the actual event, and there is no legitimate reason to discredit Johnson's testimony, the ALJ's finding here was erroneous.

On the other hand, it is DJ who had reason to lie. At trial, DJ had to be reminded that he asked Pirtle if he had been talking to Johnson because he wanted Pirtle to "admit" it.[90] In addition, Zeb Gordon, who while also involved in the PW lawsuit, went to DJ first to tell him about it, credibly testifying that DJ seemed "grateful."[91] And DJ admitted he appreciated that Gordon told him this information.[92] This evidence shows that DJ placed an importance on what he perceived to be loyalty and trustworthiness from his employees. These circumstances, along with Pirtle's and Johnson's testimony, support a finding that DJ did tell Pirtle he was being fired because he was untrustworthy and that this statement violated Section 8(a)(1) of the Act.

D. The ALJ erred in concluding that Respondent did not violate Section 8(a)(3) of the Act by discharging Michael Pirtle.

[88] Ultimately the ALJ recommends the allegation related to the statement of trustworthiness be dismissed, but he does not fully address the statement itself in his analysis, another basis on which to overturn his findings.
[89] Tr. 61.
[90] Tr. 45.
[91] Tr. 136.
[92] Tr. 41.

In analyzing whether Respondent's discharge of Michael Pirtle was unlawful, the ALJ engaged in an analysis under *Wright Line*.[93] Under *Wright Line*, the GC has the initial burden of proving that the employer was motivated, at least in part, by the employee's union or other protected, concerted activity.[94] To meet this burden, the GC must establish that:

1) the employee was engaged in protected activity;

2) the employer had knowledge of that activity; and

3) the employer held anti-union animus.[95]

Upon doing so, the burden shifts to the employer to show it would have taken the same action even if the employee had not engaged in the protected activity.[96]

ALJ Locke found that the GC had met its burden in proving the first and second prongs of the *Wright Line* test – protected activity and employer knowledge.[97] The Union does not except to either of those findings. Rather, it is the ALJ's analysis and ultimate conclusion under *Wright Line's* third prong that should be overturned.

First, Charging Party contests the ALJ's finding that Pirtle mentioned the Union before DJ did in the March 31st conversation.[98] But, even if the Board accepts the ALJ's finding on this point, the 3rd prong of *Wright Line* is still met. For example, if the Board overturns the ALJ's findings with regards to paragraph 7 in the Complaint, then the third prong of *Wright Line* must be met.[99] Those arguments are detailed above, but it is

[93] ALJD 13:18-20.
[94] *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf'd on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982).
[95] *See Williamette Industries, Inc.*, 341 NLRB 560, 562 (2004) (internal citations omitted).
[96] *Id.* at 563.
[97] ALJD 13:32-38.
[98] ALJD 10:18-21; *see also* ALJD pp. 7-10.
[99] ALJD 13:40-44.

imperative to again emphasize how DJ's question to Pirtle – whether Pirtle had been talking to Organizer Todd Johnson – and DJ's own rationale for asking it, demonstrate animus. The ALJ opined that perhaps DJ asked if Pirtle had been talking to Johnson because he was simply "curious about the extent of Pirtle's candor."[100] This speculation completely glosses over DJ's own sworn testimony – that he asked because he wanted Pirtle to "admit" it, as if he wanted to catch Pirtle in bad behavior.[101] DJ's explanation clearly and indisputably exemplifies his animus towards the employees' protected activity and the union.

The ALJ also erred in finding that the timing of Pirtle's discharge was merely a "coincidence, finding that Respondent decided on March 28 to fire Pirtle."[102] The Company's records dispute this, however; Oliver's own notes show she was not told to fire Pirtle until March 31st.[103] If Respondent made the decision to fire Pirtle on March 28th, why then wait until March 31st? DJ had just learned from Gordon about Pirtle's involvement in discussing a PW lawsuit.[104] Unlike Gordon, however, Pirtle never volunteered that information, causing DJ to question his loyalty. Respondent argues it desperately needed workers to finish the middle school project, yet DJ fired Pirtle at the beginning of his shift on March 31st instead of at the end.[105] In addition, Rhodes had been calling for at least a month to get work, yet the Respondent did not hire him until at least April 4th.[106] Even if the Board agrees that Respondent made its decision to end Pirtle's employment on March 28, the evidence shows that the action taken to effectuate

[100] ALJD pp. 10-11, FN 5.
[101] Tr. 45.
[102] ALJD 14:39-42.
[103] GCX 5; Tr. 189-90.
[104] Tr. 31, 34-35.
[105] Tr. 33, 88.
[106] GCX 6.

that decision was hastened by Pirtle's protected activity and his admission to DJ. The timing in this case shows causation, not coincidence.

For the sake of argument, ALJ Locke continued his analysis as if the GC had met the animus prong under *Wright Line*, finding that Respondent had a legitimate reason to discharge Pirtle – his poor attendance record.[107] The ALJ also used Gordon as a similarly situated comparator to find Respondent's proffered reason for discharge was not pretextual.[108] But, this comparison is inapposite. Gordon was not similarly situated for one obvious reason; he disclosed his and others' union activity to DJ.

Additionally, when looking at the Company's payroll records, Gordon and Pirtle worked a similar number of hours in most weeks.[109] And other employees called off work or did not show up without being fired.[110] Furthermore, even assuming that Pirtle had worse attendance issues than Gordon, the Company never disciplined Pirtle for his attendance and kept re-hiring him.[111]

Incredibly, according to the Company, Pirtle's behavior problems did not end with attendance. Oliver testified that in late February of 2016, she had a conversation with Pirtle the day after he had gotten into a verbal altercation with DJ, refused to answer his questions, and walked off the jobsite.[112] Oliver testified Pirtle told him he was "hazy" and "couldn't really remember what had happened."[113] Oliver told Pirtle he should not come back to work until he saw a doctor.[114] Oliver then testified that Pirtle

[107] ALJD 15:6-7.
[108] ALJD pp. 15-16.
[109] *See generally* GCX 6.
[110] *Id.*
[111] Tr. 89.
[112] Tr. 171-72.
[113] Tr. 172.
[114] *Id*.

stated "well, if I hadn't left when I did, I would have took David around back and broke his jaw."[115] Oliver told DJ about this threat and "it didn't seem to bother him."[116] DJ also testified that he had smelled alcohol on Pirtle at least once.[117]

While Charging Party argues that Pirtle's testimony should be credited over Oliver's, if true, these allegations could all be legitimate reasons to fire an employee. Yet, Respondent kept re-hiring Pirtle.[118] In fact, Respondent had never fired Pirtle before, or even disciplined him; Pirtle always quit or just "fizzled out."[119] Even after learning that Pirtle had threatened him, DJ still re-hired Pirtle.[120] Likewise, on the day that DJ said he smelled alcohol on Pirtle's breath, he let him work until the end of the day.[121] But on March 31, DJ fired Pirtle before he even began work – because he was late.[122] It is illogical that Respondent would suddenly choose to fire Pirtle because of attendance, particularly when Respondent was feeling the pressure of getting the middle school project finished on time. The question to be answered is not whether the Employer *could* have fired Pirtle, but rather, whether it *would* have. Clearly, based on past history, the answer to that question is "no."

E. The ALJ erred in concluding that Respondent did not violate the Act when it discharged Robert Rhodes.

In the case of Robert Rhodes, ALJ Locke found that Respondent did discharge Rhodes on June 2, in spite of the Company's argument that Rhodes had quit.[123]

---

[115] Tr. 172.
[116] *Id*.
[117] Tr. 29.
[118] *See e.g.* GCX (showing various times Pirtle worked for Respondent.)
[119] Tr. 218.
[120] Tr. 192-93.
[121] Tr. 47.
[122] Tr. 47.
[123] ALJD 22:39-40.

Charging Party does not except to that finding. The ALJ further finds, however, that the discharge did not violate the Act, again using the *Wright Line* framework.[124] ALJ Locke erroneously credited DJ's testimony over Rhodes, finding that while the GC established all three initial *Wright Line* elements, Respondent had effectively rebutted the unlawful motive because it had decided to fire Rhodes prior to June 2.[125] Charging Party asserts, however, that the "mixed motive" analysis under *Wright Line* is not appropriate for this case. Instead, Respondent indisputably fired Rhodes for engaging in protected conduct. The timing of the discharge was so close to the protected activity, it should be considered direct evidence of animus, and the inquiry should end there to find a violation of the Act.[126]

Perhaps the best peek into Respondent's motive in firing Rhodes comes from David Johnston's own testimony:

> Q (by Mr. Kelly): Okay. And June 2nd is the day that – what occurred on June 2nd?
>
> A: . . . I notice Robert get out of the vehicle and had a piece of paper. He handed me the piece of paper. It was – I didn't look at it very closely. It just said, intent to strike. I said okay. Ask him for my key back to the gang box in the job trailer. And he said, well, I need to get my tools. I said, okay, I'll walk you back to the gang box to get your tools.
>
> So went back to the gang box. He got his tools. Walked him almost out of the school, and so he's – I got my key back. And he said, so you're firing me because I talked to Todd Johnson. I said no, I'm firing you –

[124] ALJD pp. 25-26.
[125] ALJD 25:20-41, 26:1-10.
[126] *See e.g. Fresenius USA Manufacturing, Inc.*, 358 NLRB 1261 (2012), *citing Beverly Health & Rehabilitation Services, Inc.*, 346 NLRB 1319, 1322 (2006).

Q: Did you fire him?

A: No. No, no, I didn't. I didn't. No. I did not fire him . . .[127]

Even the ALJ was curious "what Johnston might have said if his attorney had not interrupted."[128] But, in using this exchange to help determine that Respondent had indeed fired Rhodes, the ALJ failed to take this analysis to its next logical step. Respondent terminated Rhodes *immediately* after Rhodes handed him a letter stating his, and possibly others,' intent to go on strike.[129] This timing, along with the fact that DJ knew a union petition had been filed and a prevailing wage lawsuit was pending against him is enough to establish animus. Rather, all the GC needs to establish is that the proffered reason for the discharge – attendance – was a pretext.

Regardless of the framework used, however, the evidence is clear that the Employer's defense – that it would have discharged Rhodes in spite of any protected activity – does not hold water. Respondent has attempted to show "progressive discipline" in this case, entering into evidence a "write-up" for a no-call, no-show.[130] This write-up is dated June 2 – the day Rhodes gave DJ the strike letter – and was signed by DJ and employee Gordon at 7:30 a.m., the exact time Rhodes was to start his shift.[131] DJ testified he wrote this up "for documentation that Rhodes was a no-show and no-call, and as a witness, asked Zeb Gordon to sign it . . ."[132] Yet, this was the only time Gordon had ever been asked to sign a letter like this.[133] The fact that DJ used

[127] Tr. 35-36.
[128] ALJD 19:22-23.
[129] GCX 2. The ALJ also found that the strike letter was crafted to make it look like protected, concerted activity. This finding is not relevant to the inquiry, nor does the evidence establish such a finding, and should be overturned
[130] RX 1.
[131] *Id.*
[132] Tr. 35.
[133] Tr. 161.

Gordon as his "witness" when he wrote up Rhodes should not be ignored. It is a reasonable inference that DJ purposefully involved Gordon to show him what adverse consequences could arise from supporting union activity. This inference is supported by the fact that such a write-up was not a normal Company practice.[134] The Company had not even used this practice with Pirtle, whom it claimed to have one of the worst attendance records of its employees.

The fact is that Rhodes did not have a pattern of attendance problems. There was one established instance of being late, due to a car problem, and were only two days that Rhodes followed policy and called in sick.[135] Respondent's arguments about attendance issues are merely a smokescreen. Oliver never mentioned any plan to fire Rhodes in the documents she gave to Board Agent David Watkins on June 9, 2016, for example.[136] There was no mention of any write-ups.[137] There was no mention that a termination letter had been prepared.[138] In addition, that termination letter that DJ supposedly asked Oliver to draft was dated June 2, the very day Rhodes turned in his strike letter, but was never actually given to Rhodes.[139] ALJ Locke credited Oliver as a very organized person; if she had detailed information to give the Board to defend the ULP charge, one would think some evidence of a previous decision to fire Rhodes would have been included.[140]

In addition, there was no evidence that Respondent had anyone lined up to replace Rhodes, even against an impending deadline. This is likely because Rhodes had

---

[134] Tr. 161.
[135] Tr. 106; *see also* GCX 6 (showing other employees who had called off work.)
[136] GCX 7.
[137] *Id.*
[138] RX 3; GCX 7; Tr. 269-70.
[139] *Id*.
[140] ALJD p. 8, FN 4.

no history of attendance problems, so Respondent did not think it would need to, nor was it planning to, fire Rhodes. It was not until Rhodes handed in his strike letter that Respondent decided to terminate his employment. The timing of Rhodes' discharge is too suspect to dismiss. Again, the question is not whether Respondent *could* have fired Rhodes, but rather, whether it *would* have. And, again, the answer is "no."

F. The ALJ erred in concluding that the ballots of Michael Pirtle and Robert Rhodes should not be counted.

In finding that Respondent had not violated Section 8(a)(3) of the Act, ALJ Locke also found that neither Pirtle nor Rhodes were employees at the time of the vote count, and therefore, their ballots should not be counted.[141] Should the Board overturn one or both of those findings, however, the employee who was discharged in violation of the Act would have been eligible to vote.[142] Therefore, the Board should order that such challenged ballots be counted.

VI. CONCLUSION

Considering the foregoing arguments and record evidence in this matter, Respondent respectfully requests that the Board affirm these Exceptions to ALJ Locke's March 3, 2017 Decision. Respondent requests that the Board find merit to the Complaint and conclude that Respondent Johnston Fire Services, LLC violated sections 8(a)(1) and 8(a)(3) of the Act as detailed in the General Counsel's Complaint. In addition, the Board should order that the challenged ballots of Michael Pirtle and Robert Rhodes be opened and counted in Case 10-RC-177308. In the alternative, Respondent requests the case be remanded back to the ALJ for further consideration.

[141] ALJD 16:40-43, 26:9-10.
[142] *See e.g. Syracuse Scenery and Stage Lighting Co., Inc.,* 342 NLRB 672 (2004).

Respectfully submitted,

/s/ David O'Brien Suetholz
David O'Brien Suetholz
Pamela M. Newport
Kircher, Suetholz & Associates, PSC
515 Park Avenue
Louisville, KY 40208
Tel: (502) 636-4333
Fax: (502) 636-4342
dave@unionsidelawyers.com
pamela@unionsidelawyers.com

Attorneys for Charging Party Road Sprinkler Fitters, Local Union 669

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, I filed a copy of the foregoing electronically via the National Labor Relations Board's website, at www.nlrb.gov. I further certify that a copy of the foregoing was served electronically on all parties at the following addresses:

Katherine Miller
NLRB Region 10 – Nashville Resident Office
810 Broadway, Suite 302
Nashville, TN 37203
Katherine.miller@nlrb.gov
Counsel for the General Counsel

David L. Kelly
Denton & Keuler
555 Jefferson Street
Paducah, KY 42001
dkelly@dklaw.com
Counsel for Respondent

/s/ Pamela M. Newport
Pamela M. Newport